

THE INSTITUTE FOR JUSTICE

Joseph Gay*
jgay@ij.org
Robert Frommer*
rfrommer@ij.org
901 N. Glebe Rd. Suite 900
Arlington, VA 22203
Tel. (703) 682-9320

Robert E. Johnson*
rjohnson@ij.org
16781 Chagrin Blvd. Suite 256
Shaker Heights, OH 44120
Tel. (703) 682-9320

* Admitted *pro hac vice*.

THE VORA LAW FIRM, P.C.

Nilay U. Vora (SBN 268339)
nvora@voralaw.com
Jeffrey Atteberry (SBN 266728)
jatteberry@voralaw.com
201 Santa Monica Blvd., Ste. 300
Santa Monica, California 90401
Tel. (424) 258-5190

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DONALD LEO MELLEIN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 2:23-cv-07970-RGK-MAR

**PLAINTIFF'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT
OF MOTION TO COMPEL
DISCOVERY RESPONSES**

DISCOVERY MATTER

Date: July 10, 2024
Time: 11:00 a.m.
Courtroom: 790
Judge: Hon. Margo A. Rocconi
Discovery Cutoff: Sept. 4, 2024
Pretrial Conference: Nov. 18, 2024
Trial Date: Dec. 3, 2024

1 Ninth Circuit precedent holds that, when a plaintiff alleges negligence,
 2 evidence concerning other incidents is admissible “as direct proof of negligence”
 3 so long as they bear a “substantial similarity” to the plaintiff’s claim. *Cooper v.*
 4 *Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991). Likewise, such
 5 information is admissible and discoverable for other purposes, too, such as to show
 6 how property may have gone missing. Joint Stipulation 10–11 (citing cases).

7 Here, Plaintiff Don Mellein claims the FBI misplaced gold coins in his
 8 USPV safe-deposit box, and seeks discovery about a discrete set of instances where
 9 property from other USPV boxes went missing following execution of the FBI’s
 10 seizure warrant. Under both *Cooper* and established caselaw addressing “other
 11 incidents of the same type,” Fed. R. Civ. P. 26(b) advisory committee’s note to
 12 2015 amendment (confirming that such information remains discoverable), Don is
 13 entitled to that discovery, and his motion to compel should be granted.

14 **A. The requested discovery is relevant.**

15 “Relevancy is broadly defined to encompass any matter that bears on, or that
 16 reasonably could lead to other matters that could bear on, any issue that is or may
 17 be in the case.” *Torres v. L.A. Sheriffs Dep’t*, No. 2:22-cv-07450-MWF-MAR,
 18 2024 WL 348845, at *1 (C.D. Cal. Jan. 18, 2024), *review denied*, 2024 WL
 19 1600317 (C.D. Cal. Mar. 19, 2024). Don’s portion of the Joint Stipulation pointed
 20 to binding Ninth Circuit precedent holding that the requested information is
 21 admissible (and thus discoverable) for his claim that the FBI was negligent when it
 22 allowed his coins to go missing, Joint Stipulation 11–13, as well as to numerous
 23 cases holding that such information is admissible or discoverable to identify
 24 opportunities where his property could have gone missing while in the FBI’s
 25 custody, *id.* at 10–11. The government’s contrary arguments all fall short.

26 Negligence: Under binding Ninth Circuit precedent, the requested discovery
 27 is relevant to Don’s claim that the FBI was negligent when it allowed his
 28 remaining gold coins to go missing. *Cooper*, 945 F.2d at 1105 (explaining that

1 evidence of “substantial[ly] similar[.]” incidents admissible “as direct proof of
2 negligence”). The government has no answer for that precedent, which is reason
3 alone to resolve the motion in Don’s favor. The government’s only response is that
4 Don must “still” show that the coins were lost. Joint Stipulation 18; *see also infra*
5 pp. 2–3 (explaining why requested discovery is relevant to that dispute, too). But
6 cases can have more than one dispute, and the existence of a separate dispute
7 cannot excuse the government from providing discovery for *this* dispute.

8 Even if other incidents of misplacing property in other USPV boxes were not
9 substantially similar to misplacing property in Don’s USPV box, *Cooper* holds that
10 such evidence can still be admissible for impeachment purposes. 945 F.2d at 1105.
11 The government calls this “nonsensical,” Joint Stipulation 18, but it is binding
12 Ninth Circuit precedent. The government also says Don merely “speculates” that it
13 will assert that his gold coins were safe for the several months during which the
14 FBI didn’t even know about them. *Id.* But the FBI did not make any records of any
15 of the gold coins in Don’s box when it searched it in March 2021, and it is not
16 speculative to expect the government to press the only potential (albeit weak)
17 assertion available. Don is entitled to marshal evidence to impeach that assertion.

18 The 63 missing coins: Discovery about misplaced property from other boxes
19 is separately relevant to Don’s claim that 63 of his 110 gold coins went missing
20 from his safe-deposit box after the FBI took custody of it, *id.* at 10–11, as well as
21 the government’s view that there were only 47 coins in the box because that’s all
22 the FBI says it found still inside the box months later, *e.g., id.* at 18. That’s because
23 all the boxes were searched, processed, and stored at the same time and using the
24 same procedures, so what happened to property misplaced from one box likely
25 happened to other boxes. Indeed, that’s what happened with the 47 gold coins that
26 the government stumbled upon in Don’s box: Coins and cash from at least three
27 other boxes were found to have been misplaced in exactly same way. *Id.* The
28 government calls this example “misleading[.]” *id.* at 16, but doesn’t dispute the

1 basic facts about what happened. It just prefers the euphemism “un-inventoried
 2 property,” *id.*, to describe unknowingly leaving at least a hundred thousand dollars
 3 of property in the wrong place for several months (*i.e.*, misplacing it). Whether
 4 Don’s remaining 63 gold coins were “misplaced” or simply “un-inventoried,” he’s
 5 entitled to discovery about missteps involving property from other boxes that
 6 would help explain what happened to his own property.

7 Don also cited several cases holding that the type of information he seeks is
 8 admissible for other purposes, such as to identify opportunities during the
 9 government’s handling of his coins where they could have gone missing. Joint
 10 Stipulation 11. The government dismisses these cases because they merely held
 11 that the information Don seeks is *admissible*, not “whether discovery should be
 12 compelled.” Joint Stipulation 17. But the bar for discovering information is *lower*
 13 than the bar for admitting it into evidence at trial, Fed. R. Civ. P. 26(b)(1), so if the
 14 information is admissible, it is relevant for discovery. The government also argues
 15 that the “character” of the United States is not at issue, *id.*, but the whole point of
 16 Federal Rule of Evidence 404(b)(2) is that such evidence is admissible for non-
 17 character purposes.¹

18 **B. The requested discovery is proportionate.**

19 Don’s requested discovery is also “proportional to the needs of the case.”
 20 Fed. R. Civ. P. 26(b)(1). That inquiry depends on “input from both sides.” *Scherer*
 21 *v. FCA US, LLC*, 538 F. Supp. 3d 1002, 1006 (S.D. Cal. 2021). But the “party
 22 claiming undue burden or expense ordinarily has far better information—perhaps
 23 the only information—with respect to that part of the determination.” *Id.* (quoting
 24 Fed. R. Civ. P. 26(b) advisory committee’s note to 2015 amendment). Thus, at
 25 bottom, the party resisting discovery has the “burden of proving” that relevant

26 _____
 27 ¹ The government also tries to distinguish another on-point case because it
 28 was decided before the 2015 updates to Rule 26. But that case applied essentially
 the same relevance standard at issue here. *See Albee v. Cont’l Tire N. Am., Inc.*, No.
 09-cv-1145, 2010 WL 1729092, at *7 (E.D. Cal. Apr. 27, 2010).

1 discovery “is unduly burdensome or disproportional to the needs of this case.” *Id.*
 2 at 1007; *see also Torres*, 2024 WL 348845, at *4 (“[T]he party opposing discovery
 3 has the burden of showing that discovery should not be allowed ... and supporting
 4 its objections with competent evidence.”).

5 Don explained in the Joint Stipulation why the requested information is
 6 proportional to this case. Joint Stipulation 13–14. He seeks discovery for only that
 7 discrete subset of boxes where property was allegedly misplaced, lost, or stolen. *Id.*
 8 at 14. Most or all that discovery, in turn, involves standardized forms housed in the
 9 FBI’s central recordkeeping system. There is therefore no reason to believe that
 10 identifying and producing responsive documents would impose any measurable
 11 burden. Nor is there any evidence of any burden. The government did not submit
 12 any “competent evidence” to support its “burden of proving” that the requested
 13 discovery is disproportionate. *Scherer*, 538 F. Supp. 3d at 1006–07. That
 14 evidentiary default alone is sufficient to find that the requested discovery is
 15 proportional and to grant Don’s motion to compel.²

16 **C. The government’s other arguments also fall short.**

17 Rather than presenting evidence about burden, the government declares that
 18 the documents it produced in *Snitko v. United States*, No. 2:21-cv-04405 (C.D.
 19 Cal.) should be enough. Joint Stipulation 22–23.³ But setting aside the

22 ² The cases the government cites do not hold otherwise. Its chief case, for
 23 instance, recognized that “there may be scenarios where discovery of other
 24 complaints, properly limited, are relevant and proportional to the case.” *Park v.*
 25 *Jaguar Land Rover N. Am., LLC*, No. 20-cv-242, 2020 WL 4784740, at *6 (S.D.
 26 Cal. Aug. 18, 2020). The chief problem there was simply the mismatch between the
 27 plaintiff’s request (*identities* of thousands of people who complained) and what
 28 might have been relevant (underlying *complaints* of similar battery problems). *Id.*

³ The government cites to documents subject to the *Snitko* protective order to
 argue that different agents inventoried three of the boxes with potentially misplaced
 property. But even if true, that says nothing about other boxes with misplaced
 property. Nor does it address other potential similarities, such as whether they were
 later accessible by the same people or whether they were stored in similar places.

1 government's failure to even finish producing documents in *Snitko*,⁴ that case was
 2 about whether the government's *search* of class members' USPV boxes violated
 3 the Fourth Amendment. This case involves what happened to Don's property *after*
 4 the search. That difference matters, since the FBI in *Snitko* provided some records
 5 about its initial search, not documents it created later, such as descriptions about
 6 subsequent problems with the property, *e.g.*, Declaration of Joseph Gay ("Gay
 7 Decl.") Ex. J at 74, or receipts showing what property was returned, *e.g.*, Gay Decl.
 8 Ex. L at 81. Indeed, according to the *Snitko* documents, there weren't any problems
 9 at all with Don's box. *But see* Gay Decl. Ex. J at 74. The *Snitko* documents tell part
 10 of the story, but not all of it, and not the most important parts.

11 The government also says Don has the information he needs from Agent
 12 Zellhart's deposition testimony in *Snitko* and here. Joint Stipulation 22–23. But as
 13 just noted, *Snitko* was focused on the illegal search, so there was little reason to ask
 14 about the government's handling of misplaced property *after* the search. And here,
 15 Agent Zellhart could not provide meaningful testimony about the other instances of
 16 misplaced property. *See* Gay Decl. Ex. N, at 94–95, 103–04, 106–07.

17 Finally, the government points to the name of Don's attorneys' law firm and
 18 suggests that the requested discovery is about finding additional clients. Joint
 19 Stipulation 4. But that isn't the case; indeed, given the FTCA's two-year statute of
 20 limitations, other boxholders likely could not bring the claims that Don asserts
 21 here. *See* 28 U.S.C. § 2401(b). And other boxholders have apparently already
 22 resolved their claims. Joint Stipulation 18 (noting "resolutions of other potential
 23 claims"). Don and his counsel seek this discovery for the simple reason that it is
 24 crucial to *Don's* claims about *his* box.

25
 26
 27
 28 ⁴ *See* Joint Stipulation and Req. to Cont. Trial Briefing ¶ 13, *Snitko*, D.E. 109
 at 5 (FBI's explanation that it would not be able to complete discovery in time).

1 Dated: June 26, 2024

Respectfully Submitted,

2 /s/ Joseph Gay

3 **INSTITUTE FOR JUSTICE**

Joseph Gay*

4 jgay@ij.org

Robert Frommer*

5 rfrommer@ij.org

901 N. Glebe Rd. Suite 900

6 Arlington, VA 22203

7 Tel. (703) 682-9320

Robert E. Johnson*

8 16781 Chagrin Blvd. Suite 256

rjohnson@ij.org

9 Shaker Heights, OH 44120

10 Tel. (703) 682-9320

11 * Admitted *pro hac vice*

12 **THE VORA LAW FIRM, P.C.**

Nilay U. Vora (SBN 268339)

13 nvora@voralaw.com

Jeffrey Atteberry (SBN 266728)

14 jatteberry@voralaw.com

201 Santa Monica Blvd., Ste. 300

15 Santa Monica, California 90401

16 Tel. (424) 258-5190

17 *Attorneys for Plaintiff*